No. 02-1315

IN THE

Supreme Court of the United States

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF BLACK ALLIANCE FOR EDUCATIONAL OPTIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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This brief is filed on behalf of the Black Alliance for Educational Options as amicus curiae in support of respondent.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Black Alliance for Educational Options, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. *Amicus* has obtained the written consent of all parties, through their respective counsel, for the filing of this brief.

INTEREST OF *AMICUS*

The Black Alliance for Educational Options ("BAEO") is a non-profit, intergenerational organization of educators, parents, students, community activists, public officials, religious leaders, and business people. BAEO's mission is to actively support parental choice to empower families and increase educational options for black children. While supporting choice for all families, BAEO focuses on the needs of low income and working class families. Low-income parents—principally blacks and Hispanics—have less access than middle- and upper-income parents to high-quality teachers and schools. Low-income parents are also less satisfied than middle- and upper-income parents with the schools that are available to their children. This lack of access to educational opportunities contributes to the widening gap between poor black children and whites on virtually all indicators of academic achievement. BAEO believes that the American ideal of equal opportunity is unattainable for economically disadvantaged black children so long as they continue to lag far behind national averages.

BAEO works to inform the general public about parental-choice initiatives; to educate black families about the various educational options available to them; to create, promote, and support efforts to enable black parents to exercise choice; and to heighten public awareness of efforts to reduce or limit educational options. BAEO partners with other organizations to expand educational options and empower low-income parents, enabling those parents to choose the learning environments that are best for their children.

BAEO filed an amicus brief, and firmly supports this Court's decision, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), both as a matter of constitutional law and as a matter

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Petitioners' consent letter is being filed concurrently with this brief. Respondent's consent letter is on file with the Court.

of educational policy. *Zelman* offers a ray of hope for low income and minority students. Studies published both before and after *Zelman* indicate that school choice programs have had a positive educational impact, particularly for African-American children.

BAEO is vitally interested in the outcome of this litigation not because its members have any particular interest in furthering religious belief or observance, but because religious schools in the urban centers may provide the only available private education alternative. *Cf. Zelman*, 536 U.S. at 647, 658 (96% of scholarship recipients enrolled in religious schools). Although this case does not involve a voucher plan for primary schools, it does involve a voucher plan for students seeking higher education in the State of Washington—a context where presumably there should fewer, not greater, scruples about state "support" of religion. Yet, here, Washington law enacted against the backdrop of nineteenth-century state constitutional provisions borne of hostility to particular religions, allows students to use their scholarships for virtually any college program save the study of theology in a religiously supported college.

BAEO's concern is that a failure to affirm the judgment below will lead opponents of school choice to invoke perceived state constitutional barriers so as to preclude these valuable experiments, still in their infancy, from brightening the prospects of our children who need a variety of options to give them the best chance to receive a quality education. If such barriers successfully can be raised, as one commentator

has noted, "the school voucher movement will be effectively dead as a serious option in reforming education." [2]

STATEMENT OF THE CASE

In 1999, the State of Washington created a "Promise Scholarship" program. The program provides state financial aid to students graduating from public or private high schools in the state who meet certain criteria. The regulations implementing the program are codified in the Washington Administrative Code at sections 250-80-010 *et seq*. JA 178-87.[3]

In this case, it is undisputed that the college respondent attended was an "eligible postsecondary institution"; respondent was an eligible scholarship recipient; and theology, his declared major, would have been an eligible course of study were it taught from a non-religious perspective. Respondent was denied a Promise Scholarship because the regulations require certification that the student "[i]s not pursuing a degree in theology." JA 180. This provision mirrors a section of the Washington Revised Code which provides: "No aid shall be awarded to any student who is pursuing a degree in theology." Wash.Rev.Code §28B.10.814. The statutory provision, in turn, purportedly implements provisions of the Washington constitution that prohibit the expenditure of public funds on "sectarian" education:

> "No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction . . . ." Washington Const., Art. I, § 11
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[2] *See* Mark Edward DeForrest, AN OVERVIEW AND EVALUATION OF STATE BLAINE AMENDMENTS: ORIGIN, SCOPE, AND FIRST AMENDMENT CONCERNS, 26 Harv. J.L. & Pub. Pol'y 551, 554 (2003) (hereafter "DeForrest").

[3] We cite to the parties' Joint Appendix as "JA __."

> "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Washington Const., Art. 9, § 4.

In 1999, respondent Joshua Davey applied for a Promise Scholarship during his senior year in high school. He met the academic and income requirements. JA 41. In August 1999 he was notified that he was eligible to receive the scholarship. JA 53-54.

In August 1999 Davey enrolled at Northwest College, an eligible postsecondary institution under the Promise Scholarship regulations. JA 43. He chose to pursue a double major in "pastoral ministries" and "business management/ administration." JA 43. In October 1999, Davey was informed by Northwest College officials that his chosen course of study disqualified him from receiving his Promise Scholarship money. JA 45.

In January 2000, Davey filed this lawsuit in the federal District Court for the Western District of Washington, contending that his rights under the First and Fourteenth Amendments to the U.S. Constitution and cognate rights under the Washington constitution had been violated. JA 4-24. Davey sought damages, injunctive relief, and a declaration stating that Washington's denial of state aid to students pursuing a degree in theology was unconstitutional. JA 20-21. The district court denied Davey's motion for a preliminary injunction, and ultimately granted summary judgment in favor of the Petitioners. JA 75-81, 170.

The Ninth Circuit reversed. Judge Rymer's opinion for the majority noted that the Promise Scholarship program expressly discriminates against religion: "Both the statute and [agency] implementing policy refer on their face to religion. The Promise Scholarship program is administered so as to disqualify only students who pursue a degree in theology from receiving its benefit." *Davey v. Locke*, 299 F.3d 748, 753 (9th Cir. 2002). This was a form of viewpoint-based

discrimination, the majority ruled, requiring strict scrutiny under the Free Exercise Clause of the First Amendment; and Washington lacked any legitimate interest in excluding religious study from its otherwise comprehensive scholarship program. In contrast, the dissenting judge argued that there could be no constitutional violation, as the State has no obligation to fund any particular course of study. *Id*. at 761.

SUMMARY OF ARGUMENT

This case does not present the question of whether or not students have an *affirmative* constitutional right to a publicly funded education at a private school. Neither Respondent nor BAEO quarrels here with the proposition that, as a general matter, the states are not constitutionally compelled to fund students pursuing their education in private schools.

This case is about the *negative*, defensive right to be free of discrimination against religion. Where, as here, the State establishes a comprehensive program by which it chooses to fund private educational options, it may not, consistent with the obligation of even-handedness inhering in both the First Amendment and Equal Protection Clauses, selectively refuse to provide funding for otherwise eligible students opting for a private religious education.

a. Discrimination against religious education in otherwise comprehensive state educational funding programs is prohibited by the Free Exercise and Free Speech Clauses of the First Amendment and by the Equal Protection Clause of the Fourteenth Amendment. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct *because it is undertaken for religious reasons*." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (emphasis added). The State may not discriminate against *the religiously motivated*—even when it claims it is doing so to promote the values of the Establishment Clause or some analogous state constitutional

provision. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 837-46 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393-94 (1993); *Widmar v. Vincent*, 454 U.S. 263, 275-78 (1981).

Here, Washington has chosen to exclude students pursuing a major in theology at an otherwise eligible institution of higher education, presumably because it wants to erect its own particularly high wall of separation between church and state. But this is not an adequate justification for invidious discrimination against religion. The State can choose not to fund private schools at all, but it cannot withhold from religious schools the assistance it is prepared to extend to all other private schools comparably situated, without violating the core nondiscrimination guarantee of the Free Exercise and Equal Protection Clauses.

b. Invidious discrimination against religion is particularly transparent in this case. The State of Washington's prohibition of financial aid to theology majors presumably furthers the separationist principles enshrined in the State constitution's so-called "Blaine Amendments," with their "shameful pedigree" rooted in "pervasive hostility" to religion. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). Blaine Amendments are an enduring legal legacy of the anti-Catholic bigotry that pock-marked much of nineteen-century U.S. history. These laws prohibit the public funding of "sectarian" schools, understood at the time as a thinly veiled code for Catholic schools.

Under *Romer v. Evans*, 517 U.S. 620, 634 (1996), laws rooted in hostility to a particular group—particularly, laws that prevent the possibility of evolutionary improvements for the group by ordinary legislation, as here—violate the Equal Protection Clause, even if the group would not ordinarily qualify for "suspect category" classification warranting strict judicial scrutiny.

c. School choice programs of the sort approved in *Zelman* particularly benefit the minority and low-income children whose interests BAEO seeks to protect. For these children, equality of opportunity depends on their ability to secure a quality education, and if this cannot be provided by the public schools, they should have access to the available private alternatives, rather than have such options blocked off by state constitutional scruples rooted in hostility to religion. During its first two years of operation, sixty-eight percent of the scholarship recipients in the Cleveland Pilot Program sustained in *Zelman* were African-American.[4]

A growing body of research suggests that vouchers are having a positive impact on participating students and their families (largely African-Americans) and on the public school systems that now are required to compete for students.[5] Although the programs are still in their infancy and the studies reporting progress are preliminary, the results achieved thus far strongly indicate that the school choice experiments should be allowed to continue, without the invidious sword of Blaine-Amendment inspired jurisprudence hanging over them.

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[4] *See* Paul E. Peterson, William G. Howell & Jay P. Greene, AN EVALUATION OF THE CLEVELAND VOUCHER PROGRAM AFTER TWO YEARS (Harvard Program on Education Policy and Governance, June 1999) (available at www.schoolchoiceinfo.org/research).

[5] *See, e.g.*, William G. Howell, Paul E. Peterson, Patrick J. Wolf & David E. Campbell, THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS (Brookings Institution Press 2002) (reporting that African American students participating in voucher programs in New York, Dayton and Washington DC scored, on average, three percentile points higher than their public school peers in Year 1, six percentile points higher in Year 2, and seven percentile points higher in Year 3).

ARGUMENT

I. THE FIRST AMENDMENT AND EQUAL PROTECTION CLAUSES FORBID SINGLING OUT RELIGIOUS INSTRUCTION FROM AN OTHERWISE COMPREHENSIVE STATE FUNDING OF ALL OTHER PRIVATE ALTERNATIVES

When the states elect to provide public funding to private schools or students attending private schools as part of a comprehensive educational funding program, they cannot discriminate against religion by refusing to provide funds to students attending otherwise eligible private *religious* schools. The states cannot fence out religion in such circumstances by discriminatorily denying funding to students who choose to pursue private schooling at religious institutions.

However, Washington law clearly and impermissibly discriminates against religion by distinguishing between students taking *secular* theology classes at post-secondary institutions such as the University of Washington (who presumably are entitled to a state scholarship)[6] and students taking religiously motivated theology classes at otherwise eligible institutions such as Northwest College (who are not entitled to aid under state law).

"The Free Exercise Clause 'protects religious observers against unequal treatment.'" *Church of the Lukumi Babalu Aye, supra,* 508 U.S. at 542. Only generally applicable and neutral laws may (sometimes) burden the exercise of religion. *Id.* at 533-46. In *Lukumi*, for example, the Court invalidated ordinances dealing with the ritual slaughter of animals because, while the ordinances arguably were facially neutral,

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[6] *See* Br. for the Petitoners, p. 5 (Washington Constitution "does not prohibit the secular study of the topic of religion", citing *Calvary Bible Presbyterian Church of Seattle v. Board of Regents of the University of Washington*, 436 P.2d 189 (Wash. 1968)).

they were targeted to reach the religiously *motivated* practices of the Santeria adherents.

The Free Speech Clause likewise prohibits religious viewpoint discrimination. In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Court unanimously held that a public school district could not discriminatorily refuse to make school facilities available for the showing of a religiously oriented film series, when those facilities were generally available to non-religious groups for non-religious purposes. The Court's holding was based squarely on the principle that the Free Speech Clause prohibits discrimination based on a particular point of view, *i.e.*, a religiously motivated point of view:

> "That all religions and all uses for religious purposes are treated alike under Rule 7, however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing *except those dealing with the subject matter from a religious standpoint . . . . Id* at 393-94 (emphasis added).

In *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), the Court applied the non-discrimination principle from *Lamb's Chapel* and held that the University of Virginia could not deny public funding to a religiously oriented student organization where the university was funding other, non-religious student groups. It was unconstitutional viewpoint discrimination to deny generally available funding to students who chose to use the funds for a religiously oriented activity. *Id.* at 834.

As in *Rosenberger*, Washington's comprehensive Promise Scholarship program involves a subsidy broadly available for course of instruction at eligible institutions of higher education. These grants are intended—*with the sole exception* of theology taught from a religious perspective—to be distributed by "comparatively objective decisions on

allocating public benefits . . . ." *National Endowment for Arts v. Finley*, 524 U.S. 569, 586 (1998) (citing *Rosenberger* and *Lamb's Chapel*). In short, by analogy to the "limited public forum" cases, the State has created a forum requiring evenhanded treatment of religiously motivated and non-religiously motivated students.

Washington neither has nor claims a cognizable expressive interest in the running of its Promise Scholarship program. Thus, decisions permitting the government to espouse a particular viewpoint when the state itself it is doing the speaking—*Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983)—are inapplicable.

When the state has chosen to fund both public and private school education as part of a general program with neutral qualifying criteria, as the State of Washington has done with its scholarship program, the provision of a scholarship to a qualifying individual student cannot be characterized as a form of state speech. It is the individual student who chooses where and how to apply the money. The rule prohibiting viewpoint discrimination applies, as the Ninth Circuit correctly held.

Here, there is no valid state interest supporting the classification Washington has drawn. The State argues that it is enforcing its constitutional policy requiring a "higher wall" separating church and state than the one erected under the federal Establishment Clause. *See* Br. for the Petitioners, pp. 31-32. But that is not a valid state interest justifying discrimination against religion. If a particular law or practice has survived scrutiny under the federal Establishment Clause, a state's desire to further its purportedly more rigid anti-establishment constitutional vision is not a valid state interest justifying religious discrimination. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court applied this principle—which is all the more pertinent after *Zelman*, *Lamb's Chapel* and

Rosenberger—to invalidate a state university policy that made facilities generally available for the activities of all student groups except for religious student groups seeking to use those facilities for religious worship and discussion. Writing for the Court, Justice Powell viewed the case as presenting an issue of the students' negative right to be free from religious discrimination: "The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech." *Id.* at 273.

The Court specifically rejected the State of Missouri's argument that, even if the practice did not violate the federal Establishment Clause, Missouri had a compelling interest in complying with the "stricter separation of church and State" required by the Missouri constitution:

> "[T]he state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." *Id.* at 276.[7]

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[7] Missouri is also a Blaine Amendment state. *See* Mo. Const. Art. IX, § 8 ("Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever").

In light of *Zelman*'s holding that Ohio's school voucher program does not violate the federal Establishment Clause, it is clear that public money constitutionally may reach private, religious schools as long as that is the result of a "true private choice" by students or their parents. States willing to fund private sector alternatives may not frustrate that ruling by claiming that their constitutions impose heightened restrictions (or even absolute prohibitions) on aid to students pursuing education at private, religious schools.[8]

II. THE EQUAL PROTECTION CLAUSE INVALIDATES STATE CONSTITUTIONAL PROVISIONS ROOTED IN HOSTILITY TOWARDS A PARTICULAR GROUP

For purposes of Equal Protection Clause analysis, hostility or animus towards a class of persons is *never* a valid state interest:

> "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).[9]

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[8] Contrary to the dissent below, failure-to-fund cases like *Maher v. Roe*, 432 U.S. 464 (1980), are inapposite, because the exclusion here of theology majors taught from a religious perspective, is undergirded by no legitimate state interest, no legitimate "policy preference," *id*. at 470, other than separationist concerns no longer cognizable after *Zelman*. *See also* Pt. II, *infra*.

[9] As Justice O'Connor indicated in her concurring opinion in *Lawrence v. Texas*, __ U.S. ___, 123 S. Ct. 2472, 2484-85 (2003), *Romer* is not an island of analysis unto itself. Rather, it is part of a line of cases invalidating laws that are based on the hostility of the majority to a distinctly disfavored group. *See, e.g.*, *Moreno*, 413 U.S. at 535 (invalidating a law "intended to prevent so-called 'hippies' and 'hippie

The constitutionally required separation between church and state does not permit hostility towards religion. And despite the State's effort to put distance between this case and its Blaine-Amendment inspired jurisprudential provenance, Br. for the Petitioners, p. 1 n. 1, the legislative prohibition that denies Davey his Promise Scholarship is indeed rooted in this troubling history.

For a good part of the nineteenth century, the country's public schools were "propagators of a generic Protestantism that . . . 'was intolerant of those who were non-believers.'"[10] The Protestant King James Bible was a part of the public schools' core curriculum. As Steven K. Green, author of a so-called historians' brief on behalf of Petitioners in this case, has acknowledged in his scholarly writings: "In all levels of education, both public and private, primary through collegiate, the moral teachings of the Bible were taught and, to varying degrees, religious services were conducted . . . . Schools were the primary promulgators of this Protestant way of life." [11]

A week after a 1875 speech by then President Grant attacking government support for "sectarian schools" and calling for public education "unmixed with sectarian, pagan or atheistical dogmas," Congressman Blaine proposed a consti-

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communes' from participating in the food stamp program"); *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (invalidating a Texas statute that denied public funding to any local school district that permitted the enrollment in its schools of children of illegal aliens); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985) (invalidating a local zoning ordinance prohibiting a group home for the mentally retarded because "[t]he short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . . .").

[10] *See* DeForrest, *supra* note 2, at 559 (citation omitted).

[11] Steven K. Green, THE BLAINE AMENDMENT RECONSIDERED, 36 Am. J. Legal Hist. 38, 45 (1992).

tutional amendment to implement these ideas.[12] Although carefully written to appear uniform in removing all religion from the public schools, its purpose was unambiguous: to ban all public aid to private non-Protestant (primarily Catholic) schools.[13] In its final Senate form, Blaine's proposed amendment read as follows:

> "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall be required as a qualification to any office or public trust under any State. No public property and no public revenue, nor any loan of credit by or under the authority of the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to or made or used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, *or wherein the particular creeds or tenets shall be taught.* And *no such particular creed or tenets shall be read or taught* in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination or to promote its interests or tenets. *This article shall not be construed to prohibit the reading of the Bible in any school or institution*, and it shall not have the effect to impair the rights of property already vested."[14]

Blaine's proposed amendment passed the House in 1876 by a vote of 180 to 7, but in the Senate it fell 2 votes short of the

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[12] DeForrest, *supra* note 2, at 565-66.

[13] *See* Joseph P. Viteritti, BLAINE'S WAKE: SCHOOL CHOICE, THE FIRST AMENDMENT, AND STATE CONSTITUTIONAL LAW, 21 Harv. J.L. & Pub. Pol'y 657, 670-72 (1998) (hereafter "Viteritti"); DeForrest, *supra* note 2, at 568-69.

[14] Quoted in DeForrest, *supra* note 2, at 568 (emphasis added).

two-thirds majority required for passage and submission to the states.[15]

Although they did not become a part of the federal Constitution, "Blaine Amendments"—versions of the federal constitutional proposal—eventually found their way into approximately 30 state constitutions. Some states voluntarily adopted Blaine Amendments almost immediately after the failure of the proposed national amendment; some states voluntarily adopted them in later years; and still other states had Blaine Amendments imposed on them by the federal government as a condition of admittance to the Union.[16]

Blaine Amendments were imposed on the State of Washington (and on North Dakota, South Dakota and Montana) by the federal Enabling Act of 1889. Enabling Act, ch. 180, 25 Stat. 676-77 (1889).[17] The Enabling Act authorized the Washington constitutional convention but prescribed certain conditions on the admittance of Washington to the Union, including adoption of state constitutional Blaine Amendments. Section 4 of the Enabling Act compelled Washington (among other things) to establish public schools free from "sectarian" influence:

> "Fourth. Provision shall be made for the establishment and maintenance of systems of public schools free from *sectarian control* which shall be open to all the children of the said state." *Ibid.* (emphasis added).

"While the wording of the Enabling Act, like the wording of the original Blaine Amendment itself, appears neutral, those

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[15] DeForrest, *supra* note 2, at 573; Robert F. Utter & Edward Larson, CHURCH AND STATE ON THE FRONTIER: THE HISTORY OF THE ESTABLISHMENT CLAUSES IN THE WASHINGTON STATE CONSTITUTION, 15 Hastings Const. L.Q. 451, 462-64 (1988) (hereafter "Utter & Larson").

[16] DeForrest, *supra* note 2, at 573.

[17] For the complicated political history of the Enabling Act of 1889, *see generally* Utter & Larson, *supra* note 15, at 458-61.

words were intended to reinforce the generic Protestantism of the common schools."[18] As this Court previously observed, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell, supra*, 530 U.S. at 828.

Of course, Washington complied with the federal mandate. The provisions of Section 4 of the Enabling Act itself are contained in Article XXVI of the Washington constitution, captioned "Compact with the United States." [19] Article IX, Section 4 of the Washington constitution prohibits "sectarian control or influence" over the state's schools:

> "Sectarian control or influence prohibited. All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." [20]

The Washington supreme court recently has held that this section applies only to primary and secondary schools. *See State ex rel Gallwey v. Grimm*, 48 P.3d 274, 279-84 (Wash. 2002) ("Based on the abundance of structural and historical evidence available, we hold that article IX, section 4 was not intended to apply to institutions of higher education."). Constitutional restrictions on public support for post-secondary private religious schools are contained in Article I, Section 11 of Washington's constitution, which provides:

> "Religious freedom. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of

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[18] DeForrest, *supra* note 2, at 574.

[19] *See* Robert F. Utter and Hugh D. Spitzer, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE (Greenwood Press 2002) (hereafter "Utter & Spitzer, THE WASHINGTON STATE CONSTITUTION").

[20] Quoted in *id.* at 159.

> licentiousness or justify practices inconsistent with the peace and safety of the state. *No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . . .*" [21]

The two provisions cannot, however, be easily separated. Article I, Section 11 "is usually interpreted in tandem with Article IX, Section 4, which specifically requires that schools supported wholly or in part by public funds be free from sectarian control or influence." [22] The "sole purpose" of the italicized section of Article I, Section 11 was to prohibit the expenditure of public funds for "sectarian" religious instruction:

> "Consideration of these various historical sources demonstrates that the sole purpose of the 'religious instruction' clause of Const. art. 1, § 11 was to prevent public schools from giving sectarian religious instruction and to prevent the use of public funds to support private parochial schools."

See Witters v. State of Washington Commission for the Blind, 771 P.2d 1119, 1130 (Wash. 1989) (Utter, J., dissenting, joined by Dolliver and Dore, JJ).

Blaine Amendments reflect a form of raw religious animus dressed up as principled separateness between church and state. The governmental animus behind their enactment places in constitutional doubt their legal progeny.

In many respects, this case resembles *Romer v. Evans, supra.* In *Romer*, at issue was a state constitutional provision that discriminated against homosexuals. Here, it is a state constitutional provision that discriminates against religious believers (or those simply religiously curious) seeking education. In both situations, the state has written a provision

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[21] Quoted in *id.* at 25 (emphasis added).

[22] *Id.* at 26.

(or provisions) into its organic law that intentionally de-legitimizes a class of its citizenry. Homosexuals in Colorado were prohibited by Amendment 2 from seeking legislative protection from discrimination; those seeking education under religious auspices are prohibited, by legislation stemming from Blaine-Amendment jurisprudence, from obtaining funding that is made available by the state to all other students attending both public and private schools. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer*, *supra*, 517 U.S. at 633.[23]

III. BLAINE AMENDMENT-INSPIRED LAWS SHOULD NOT BE PERMITTED TO CUT SHORT THE SCHOOL CHOICE EXPERIMENT

Approximately 85 % of the country's private schools have some religious affiliation.[24] In the Cleveland program upheld

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[23] Lower federal courts have cited *Romer* for the proposition that discrimination against students seeking generally available state aid to attend private religious schools violates the Equal Protection Clause. *E.g.*, *Peter v. Wedl*, 155 F.3d 992, 996 (8th Cir. 1998) (citations omitted) ("While children who attended private nonreligious schools could receive government-funded special education services directly at their private schools, students like [plaintiff] could not. Government discrimination based on religion violates the Free Exercise Clause of the First Amendment, the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment."). *See also Columbia Union College v. Clarke*, 527 U.S. 1013 (1999) (Thomas, J., dissenting from the denial of certiorari) ("Columbia's exclusion from the [state aid program] 'raises the inevitable inference that the disadvantage imposed is born of animosity to the class of [institutions] affected'" (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

[24] DeForrest, *supra* note 2, at 554; *see also Zelman*, *supra*, 536 U.S. at 656-57 ("But Cleveland's preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities").

in *Zelman*, approximately 82 % of the private schools participating in the program at that time were religiously affiliated private schools, and 96 % of the students receiving a voucher in that program applied it towards an education at a private religious school. *Zelman*, *supra*, 536 U.S. at 647, 658. Approximately 30 states have Blaine Amendments in their constitutions.[25] Thus, if religious schools are excluded from school choice programs by operation of these discriminatory laws, "the school voucher movement will be effectively dead as a serious option in reforming education." [26]

The school voucher experiment, stymied for years by legal uncertainty,[27] is beginning to influence the future of educational opportunity in this country, and should not be nipped in the bud in this way. The available information suggests there are many benefits to school choice programs, particularly for African-American students, that are only now beginning to be realized.

First, the data indicate that African-American students participating in voucher programs achieve higher levels of academic achievement than their non-participating peers. A study of a privately funded school voucher program operating in Washington D.C. reported statistically significant gains for participating African-American students in both reading and math achievement test scores.[28] Another study conducted

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[25] DeForrest, *supra* note 2, at 554.

[26] *Ibid*.

[27] *Zelman*, *supra*, 536 U.S. at 660, n. 5.

[28] *See* Patrick J. Wolf, Paul E. Peterson, & Martin R. West, RESULTS OF A SCHOOL VOUCHER EXPERIMENT: THE CASE OF WASHINGTON, D.C. AFTER TWO YEARS (August 2001) (available at www.ksg.harvard.edu/pepg/pdf/PEPG01-05%20Exec%20Sum.pdf) ("Overall, the effect of the voucher intervention on the combined reading and math achievement of the African American students was 9 National Percentile Rank (NPR) points. The gain of these students relative to the control group was nearly 10 NPR points in math and 8 NPR points in reading, effects that are each

jointly by Harvard University, Mathematica Policy Research, Inc. and the University of Wisconsin regarding the privately funded voucher program in New York City reported similar results.[29] In New York, African-American students who used a voucher to go to a school of choice for three years had a composite National Percentile Rank (NPR) of 26.83 on their follow-up tests, compared with a control group of African-American students who had an NPR composite score of 17.60—a 9.23 percentile point difference. The scores of all African-American students who had attended a school of choice on a voucher for at least one year had a composite NPR of 25.37, compared with a composite score of 17.82 for the control group—a difference of 7.55 percentile points after only one year in the voucher program.[30] According to a recently published study reporting combined results from research on the New York, Dayton, Ohio and Washington D.C. voucher programs, "African American students participating in voucher programs scored, on average, three

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statistically significant and are not significantly different from each other. The test score effects for the younger cohort of students were indistinguishable from the effects for the older cohort").

[29] *See* Daniel P. Mayer, Paul E. Peterson, David E. Myers, Christina Clark Tuttle & William G. Howell, SCHOOL CHOICE IN NEW YORK CITY AFTER THREE YEARS: AN EVALUATION OF THE SCHOOL CHOICE SCHOLARSHIPS PROGRAM FINAL REPORT (Mathematica Policy Research, Inc., Report No. 8404-045, February 19, 2002) ("Executive Summary" available at http://www.ksg.harvard.edu/pepg/pdf/nyc %20yr3%20MPR-PEPG%20exec.summ%202.19.02.pdf). This study also found no statistically significant impact of the voucher program on achievement levels for Latino students but, significantly, it did not find any detrimental impact on those students.

[30] The results are even more dramatic for math achievement, where African-American voucher students who stayed in a school of choice for three years scored a full 11.80 percentile points higher on the math test than did the control group, and voucher students who had attended a private or parochial school for at least one year scored 9.65 percentile points higher in math. *Ibid.*

percentile points higher than their public school peers in Year I, six percentile points higher in Year II, and seven points higher in Year III. Aggregated test score differences after two and three years were statistically significant. In no city or year did the scores of non-African American students in public and private schools differ significantly from one another." [31]

Second, studies indicate that the enhanced competition spurred by voucher programs is driving the public schools to improve their performance. This is one of the goals of school choice programs. (A majority of the students in this country will continue to be educated in the public schools, regardless of the popularity of school choice programs.) One study analyzed the performance of public schools faced with competition from voucher programs in Milwaukee, Wisconsin and San Antonio, Texas.[32] It found that public schools in San Antonio "did as well or better than 85% of Texas school districts, after controlling for population demographics and local resources." [33] In Milwaukee, the study found that private-school competition (at the fourth grade level) and charter-school competition (at the tenth grade level) caused significant improvements in public school test scores after controlling for other factors.[34] A recently published working paper regarding Florida's voucher program reports that "Florida's low-performing schools are improving in direct proportion to the challenge they face from

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[31] William G. Howell, Paul E. Peterson, Patrick J. Wolf & David E. Campbell, THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS (Brookings Institution Press 2002), at 140-167.

[32] *See* Jay P. Greene & Greg Forster, RISING TO THE CHALLENGE: THE EFFECT OF SCHOOL CHOICE ON PUBLIC SCHOOLS IN MILWAUKEE AND SAN ANTONIO (Manhattan Institute October 27, 2002) (available at www.manhattan-institute.org/html/cb_27.htm).

[33] *Id.* at 8.

[34] *Ibid.*

voucher competition. These improvements are real, not the result of test gaming, demographic shifts, or the statistical phenomenon of 'regression to the mean.'" [35]

Third, studies show that "school choice helps promote integration" in the schools.[36] On average, private schools typically are better racially integrated than the public schools because private schools draw students from across political and neighborhood boundaries, allowing them to transcend segregated housing.[37] In Cleveland, "nearly a fifth (19.0%) of choice students attend private schools that have a racial composition that is within 10% of the average racial composition in the Cleveland area. This is considerably better than the 5.2% of Cleveland metro area public school students, the 10.2% of Cleveland City public school students, or the 3.3% of Cleveland suburban public school students who attend schools that are similarly racially mixed." [38] A

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[35] Jay P. Greene & Marcus A. Winters, WHEN SCHOOLS COMPETE: THE EFFECTS OF VOUCHERS ON FLORIDA PUBLIC SCHOOL ACHIEVEMENT (Manhattan Institute, August 2, 2003), at p. 2 (available at www.manhattan-institute.org/html/ewp_02.htm#01). ("Schools already facing competition from vouchers showed the greatest improvements of all five categories of low-performing schools, improving by 9.3 scale score points on the FCAT math test, 10.1 points on the FCAT reading test, and 5.1 percentile points on the Stanford-9 math test relative to Florida public schools that were not in any low-performing category . . . Schools threatened with the prospect of vouchers showed the second greatest improvements, making relative gains of 6.7 scale points on the FCAT math test, 8.2 points on the FCAT reading test, and 3.0 percentile points on the Stanford-9 math test").

[36] Jay P. Greene, THE RACIAL, ECONOMIC, AND RELIGIOUS CONTEXT OF PARENTAL CHOICE IN CLEVELAND (October 8, 1999), at 13 (available at www.schoolchoiceinfo.org/data/research/Clevint.pdf) ("Private schools, and perhaps particularly religious private schools, appear able to transcend resistance to integration in housing to provide schools that are racially, economically, and religiously integrated").

[37] *Id.*, at 5.

[38] *Id.* at 8.

study conducted in Milwaukee found that religiously affiliated private schools there were the *most* racially integrated as between public, private nonreligious and private religious schools.[39] Thus, school choice programs also further compelling constitutional values. *See Grutter v. Bollinger* __ U.S. __, 123 S. Ct. 2325, 2340 (2003); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

Other socially desirable consequences flowing from school choice programs include enhanced parental satisfaction[40] and a decreasing incidence of disciplinary problems such as fighting and cheating.[41] There is evidence that attendance at private school on a voucher increases the self-confidence of

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[39] Howard L. Fuller & Deborah Greiveldinger, THE IMPACT OF SCHOOL CHOICE ON RACIAL INTEGRATION IN MILWAUKEE PRIVATE SCHOOLS (American Education Reform Council, August 2002), at 6 (available at www.schoolchoiceinfo.org/data/research/integ0802.pdf).

[40] *See* Jay P. Greene, A SURVEY OF RESULTS FROM VOUCHER EXPERIMENTS: WHERE WE ARE AND WHAT WE KNOW 4-5, Civic Report, No. 11 (July 2000) (available at www.schoolchoiceinfor.org/research) ("after two years of the program choice parents were significantly more satisfied with almost all aspects of their children's education than were the parents of a random sample of Cleveland public school parents. Nearly 50 percent of choice parents reported being very satisfied with the academic program, safety, discipline, and teaching of moral values in the private school," compared to only 30 percent of Cleveland public school parents who reported similar levels of satisfaction).

[41] *See* Paul E. Peterson & David E. Campbell, AN EVALUATION OF THE CHILDREN'S SCHOLARSHIP FUND (May 2001), at 19 (available at www.schoolchoiceinfo.org/research) (reporting that the Children's Scholarship Fund found that far fewer private school parents than public school parents rated the following problems as serious at their children's schools: fighting; cheating; stealing; gangs; racial conflict; and guns).

the student.[42] There also is some evidence that vouchers facilitate racial comity.[43]

African-American children stuck in failing public schools are entitled to the opportunities and benefits potentially available through these school choice programs. By practical necessity, many of the achievements reported in these studies were attained in private religious schools. Blaine Amendments and Blaine-influenced legislation should not be allowed to eviscerate programs that hold such promise for so many historically disadvantaged low-income and minority children.

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[42] William G. Howell, Paul E. Peterson, Patrick J. Wolf & David E. Campbell, THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS (Brookings Institution Press 2002), at 123-125 ("After two years in Dayton, for example, private school students were significantly more likely than the control group to say 'I feel good about myself,' and in Washington, private school students were more likely to say that they were 'able to do things as well as most other people'").

[43] *Id.* at 128-130 ("On average, private school parents in New York City, Dayton, and Washington were less likely than their public school counterparts to report that racial conflict was a serious problem in their child's school").

CONCLUSION

The judgment of the Court of Appeals should be affirmed. The Court should hold that discrimination against religious education in the distribution of state aid that is extended broadly for use in the private sector, is forbidden under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. When a state elects to fund students attending private schools, it cannot refuse to extend the same assistance to otherwise eligible students who choose to pursue a religiously oriented course of study at otherwise eligible institutions.

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